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10 Attorneys for Petitioner

11 **BEFORE THE STATE OF CALIFORNIA**
12 **STATE WATER RESOURCES CONTROL BOARD**

13 In the Matter of the Petition for Review
14 by FAIRCHILD SEMICONDUCTOR
15 CORPORATION, through the successor
16 to certain environmental liabilities,
17 Schlumberger Technology Corporation,
18 of Cleanup and Abatement Order No.
19 R2-2008-0104

20 **PETITION FOR REVIEW**
21 **REQUEST FOR HEARING**
22 **REQUEST FOR STAY**

23 Fairchild Semiconductor Corporation, through the successor to certain of its
24 environmental liabilities, Schlumberger Technology Corporation, ("Petitioner") hereby files this
25 petition for review and request for a hearing by the State Water Resources Control Board ("State
26 Board") of Cleanup and Abatement Order No. R2-2008-0104 (the "Order") adopted on
27 December 10, 2008 by the California Regional Water Quality Control Board, San Francisco Bay
28 Region ("Regional Board"). This petition for review is filed pursuant to the Water Code § 13320
and 23 CCR § 2050 *et seq.* The petition is accompanied by a Memorandum of Points and
Authorities, attached as Exhibit A, a copy of the Order, attached as Exhibit B, a summary of
information on other sites referenced by the Regional Board in support of naming Fairchild,
attached as Exhibit C, and excerpts from the administrative record, attached as Exhibit D.
Petitioner further requests a stay of implementation of the Order pending review by the State
Board. A declaration in support of the stay request is attached as Exhibit E.

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1 **SUMMARY**

2 Fairchild Semiconductor Corporation ("Fairchild") leased 844 E. Charleston Road, Palo
3 Alto, California (the "Site") between 1957 and 1967. The Regional Board has twice rejected
4 naming Fairchild as a discharger at the Site, once in 1990 and a second time in 1995. In an
5 extraordinary reversal, the Regional Board voted 4 to 2 on December 10, 2008 to name Fairchild
6 on the Order. Regional Board staff asserted two "new" pieces of evidence as support for naming
7 Fairchild. The first "new" evidence was a sewer video taken more than forty years after
8 Fairchild left the Site. The second piece of "new" evidence was the Regional Board staff's
9 claimed experience in 2008, as opposed to its experience in 1990 and 1995, that sewer lines are
10 prone to leak. Neither of these justifications is sufficient to support the naming of a discharger
11 pursuant to § 13304 of the Water Code.

12 The record indicates that Fairchild used small quantities of organic solvents and acids for
13 less than four years, between 1957 and 1961, in connection with research and development
14 activities at the Site. These small quantities of chemicals were discharged to a newly installed
15 sewer lateral line that drained to a sewer main along E. Charleston Road. Fairchild ceased the
16 use of chemicals of concern at the Site in early 1961. After Fairchild's departure from the Site in
17 1967, Advalloy, Inc. ("Advalloy"), operated at the Site for more than twenty five years. Unlike
18 Fairchild, Advalloy conducted extensive manufacturing operations, used and stored thousands of
19 gallons of chemicals, including solvents and acids, and was cited on more than fifty occasions for
20 environmental and chemical handling violations.

21 Because the Regional Board lacked a substantial, credible, and reliable basis to name
22 Fairchild as a discharger on the Order, the Petitioner is requesting that the State Board remove
23 Fairchild from the Order. In support of this petition, Petitioner provides the following
24 information, pursuant to 23 California Code of Regulations ("CCR") § 2050(a):

1 **I. Name and Address of Petitioner**

2 Fairchild Semiconductor Corporation, through the successor to certain
3 environmental liabilities, Schlumberger Technology Corporation

4 Schlumberger Technology Corporation

5 Attn: Mr. Du'Bois Ferguson
6 North American Remediation Manager
7 300 Schlumberger Drive
8 Sugar Land, TX 77478

9 Telephone: (281) 285-3692
10 Facsimile: (281) 285-7656
11 E-Mail: dferguson3@slb.com

12 With copies to counsel at:

13 Richard C. Coffin
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21 **II. Specific Action State Board is Requested to Review**

22 Petitioner requests that the State Board review Order No. R2-2008-0104 (Exhibit B),
23 transmitted by Bruce Wolfe, Executive Officer, by letter dated December 12, 2008.

24 **III. Date on Which Regional Board Acted**

25 The date of the Regional Board's action subject to review is December 10, 2008.

26 **IV. Statement of Reasons for the Petition**

27 Petitioner respectfully requests the State Board review the Regional Board's
28 determination to name Fairchild as a discharger because (1) there is no substantial, credible, and
reasonable evidence of a discharge, release, or spill during Fairchild's occupancy at the Site
decades ago; (2) the Regional Board ignored the conclusions of its own expert, without
explanation, that the sewer lateral used by Fairchild had no evidence of corrosion or leaking from
chemical discharges; and (3) standard investigatory techniques were not performed to evaluate
whether the sewer lateral briefly used by Fairchild is a source of any contamination at the Site.

1 Additionally, the Regional Board has no basis to require Fairchild to remediate up-gradient soil
2 and groundwater contamination for which there is no evidence Fairchild had responsibility.

3 Further argument in support of this Petition is included in the Petitioner's Statement of
4 Points and Authorities, attached as Exhibit A.

5 **V. Petitioner is Aggrieved**

6 Petitioner is the successor in interest to certain Fairchild environmental liabilities.
7 Fairchild has been unlawfully and unreasonably named as a discharger on the Order. Petitioner
8 will be required to expend significant costs to comply with the terms of the Order. Petitioner will
9 also be subject to potential third-party suits for past and future cleanup costs associated with the
10 Site.

11 Further explanation of Petitioner's aggrieved status is included in the attached Petitioner's
12 Memorandum of Points and Authorities (Exhibit A).

13 **VI. Specific Action Requested**

14 Petitioner respectfully requests that the State Board:

15 (a) Set aside or modify the Order against Fairchild, pursuant to 23 CCR §
16 2052(a)(2)(B), or direct the Regional Board to take such action itself pursuant to 23 CCR §
2052(a)(2)(C), to remove Fairchild Semiconductor Corporation as a named discharger;

17 (b) Stay implementation of the Order pending review by the State Board, as requested
18 below and in the attached Petitioner's Statement of Points and Authorities;

19 (c) Allow Petitioner to supplement the record with such additional evidence as may
become available; and

20 (d) Hold a hearing for the purpose of oral argument and receipt of any relevant
21 additional evidence, pursuant to 23 CCR § 2052(c).

22 **VII. Statement of Points and Authorities on Legal Issues**

23 As noted previously, Petitioner's Statement of Points and Authorities is attached in
24 Exhibit A.

25 **VIII. Statement that Petition Sent to Regional Board**

26 A copy of this petition has been sent to the Executive Officer of the Regional Board on
27 January 9, 2008 via U.S. Mail, and to Laurent Meillier, of the Regional Board Staff, on January
28 9, 2008 via electronic mail.

1 **IX. Statement that Issues were Raised Below**

2 All substantive issues and objections raised by this Petition were raised before the
3 Regional Board, or Petitioner was not required to raise them, or was unable to raise them below
4 because Petitioner was unaware of them and could not have been reasonably aware of them in
5 time to so raise them before the Regional Board.

6 **X. Request to Regional Board for Preparation of the Administrative Record**

7 By copy of this petition to the Executive Office of the Regional Board, Petitioner hereby
8 requests the preparation of the administrative record herein. Petitioner reserves its rights to
9 amend and/or supplement Petitioner's Statement of Points and Authorities after preparation of the
10 Administrative Record for this matter. Petitioner also reserves its rights to request a hearing for
11 the purpose of presenting evidence not previously presented to the Regional Board, in accordance
12 with 23 CCR § 2050.6(b) and to supplement the record before the State Board pursuant to Water
13 Code § 13320(b).

14 **REQUEST FOR STAY**

15 Petitioner requests a stay of the Order as to Petitioner pursuant to California Water Code
16 § 13321(a) and 23 CCR § 2053. The basis for the request for a stay is further addressed in
17 Petitioner's Statement of Points and Authorities (Exhibit B) and the declaration of
18 [DECLARANT] (Exhibit D), as required pursuant to 23 CCR § 2053.

19 **CONCLUSION**

20 For the foregoing reasons, and as further addressed in Petitioner's Statement of Points and
21 Authorities, Petitioner requests that the State Board accept this petition for review of the Order,
22 stay operation of the Order as it applies to Fairchild until the petition for review has been fully
23 considered, allow the record to be supplemented to include relevant information as necessary for
24 the State Board's full and fair evaluation of this matter, and hold a hearing on Petitioner's request
25 that Fairchild be removed as a named discharger on the Order.

1 Dated: January 9, 2009

Respectfully submitted,

2 BARG COFFIN LEWIS & TRAPP, LLP

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RICHARD C. COFFIN

J. TOM BOER

Attorneys for Petitioner

SCHLUMBERGER TECHNOLOGY CORPORATION

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PETITION FOR REVIEW
REQUEST FOR HEARING
REQUEST FOR STAY

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12 FAIRCHILD SEMICONDUCTOR
13 CORPORATION, through the successor to certain
14 environmental liabilities, Schlumberger
Technology Corporation, of Cleanup and
Abatement Order No. R2-2008-0104

**EXHIBITS IN SUPPORT OF
PETITION FOR REVIEW**

15
16 Exhibit A: Memorandum of Points & Authorities

17 Exhibit B: Final Site Cleanup Requirements Order No. R2-2008-0104

18 Exhibit C: Summary of sites referenced by Regional Board to support allegation that sewer
19 lines are "prone to leak" and associated excerpts

20 Tab 1: Excerpts from Union Pacific Railroad Company Supplemental
Investigation Report, Plymouth Street Site (May 15, 2008)

21 Tab 2: Excerpts from Kennedy/Jenks Consultants Letter Report (February 20,
22 1998)

23 Tab 3: Staff Summary Report for City of Redwood City, Sequoia Station
(September 16, 1998)

24 Tab 4: Letter from Stephen Morse, Chief, Toxics Cleanup Division, Regional
25 Board to R.B. Dantes, District Branch Chief, Caltrans (November 8, 1999)

26 Exhibit D: Excerpts from Anticipated Administrative Record

27 Tab 1: Site Cleanup Requirements Order No. 90-016

28 Tab 2: Site Cleanup Requirements Order No. 95-222

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- Tab 3: California Regional Water Quality Control Board, San Francisco Bay Region, Transcript of Proceedings for Item 7, Advalloy, Inc. – Adoption of Final Site Cleanup Requirements (December 10, 2008)
- Tab 4: Site Map
- Tab 5: Declaration of Julius Blank (November 21, 1989)
- Tab 6: Declaration of Jeffrey Wilson (November 26, 1969)
- Tab 7: Regional Water Quality Control Board, Executive Officer Summary Report (January 17, 1990)
- Tab 8: Declaration of James E. Boarer (November 27, 1989)
- Tab 9: Letter from Stephen Morse, Water Board, to Ronald Hothem, East Charleston, Inc., (November 7, 1995)
- Tab 10: Draft Regional Board Response to Comments (August 5, 2008)
- Tab 11: Lease between Edward and Gladys Schlager and Fairchild Semiconductor Corp. (September 26, 1957)
- Tab 12: California Regional Water Quality Control Board, San Francisco Bay Region, Staff Report and Recommendation to Name Fairchild Semiconductor Corporation (December 3, 2008)
- Tab 13: Letter Report from InfraMetrix (December 1, 2008)
- Tab 14: State Water Resources Control Board Order WQ 97-08 (SWRCB/OCC File A-1039)
- Tab 15: Table 3 – Summary of the Available Records of Advalloy’s Chemical Storage/Usage, Weiss Associates (October 20, 2008)
- Tab 16: Table 4 – Advalloy Hazardous Material Handling Violations and Notices, Weiss Associates (October 20, 2008)
- Tab 17: Fact Finding Memo prepared by Regional Board Staff (October 27, 2008)
- Tab 18: TCE Isoconcentration Contours in A Water-Bearing Zone on October 19, 1999, prepared by Weiss Associates (October 20, 2008)

Exhibit E: Declaration in Support of Stay Request



EXHIBIT A

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11 In the Matter of the Petition for Review
by FAIRCHILD SEMICONDUCTOR
12 CORPORATION, through the successor
to certain environmental liabilities,
13 Schlumberger Technology Corporation,
of Cleanup and Abatement Order
14 No. R2-2008-0104

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF THE
PETITION FOR REVIEW AND REQUEST
FOR STAY OF CLEANUP AND
ABATEMENT ORDER NO. R2-2008-0104**

15
16 This petition concerns whether the Regional Water Quality Control Board, San Francisco
17 Bay Region ("Regional Board") can name a party as a discharger on a cleanup and abatement
18 order based solely on conjecture that a newly constructed sewer lateral "would have" leaked after
19 only four years of minimal usage and in the absence of standard environmental sampling to
20 assess whether the lateral is a source of contamination. This Petition presents novel legal and
21 factual issues because the Regional Board has never named a discharger for an alleged release
22 that would have had to occur decades ago on the basis of such thin circumstantial evidence.

23 By a 4-2 vote at a hearing on December 10, 2008, the Regional Board named Fairchild
24 Semiconductor Corporation ("Fairchild" or "Petitioner") as a discharger on Cleanup and
25 Abatement Order No. R2-2008-0104 ("Order") in connection with the cleanup of 844 E.
26 Charleston Road, Palo Alto, California (the "Site"). Petitioner respectfully requests that the State
27 Water Resources Control Board ("State Board") order the Regional Board to remove Fairchild as
28 a discharger from the Order and stay implementation of the Order pending that determination.

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1 The Regional Board twice rejected efforts to have Fairchild named on a cleanup order in
2 connection with the Site during the 1990s. There is no substantial, reasonable, or credible
3 evidence to support the Regional Board's 2008 reversal of its prior determinations. The Regional
4 Board has disregarded its own policies and practice by naming Fairchild on the Order without a
5 reasonable investigation to determine whether the relevant sewer lateral at the Site is a source.
6 Naming Fairchild ignores substantial evidence that there were no spills or discharges during
7 Fairchild's short occupancy of the Site forty years ago and is based on unsupported conjecture
8 that there "may have been" a leak from the newly installed cast iron sanitary sewer lateral during
9 the four year period between 1957 and 1961 when Fairchild used small quantities of acids and
10 solvents for research purposes. In so doing, the Regional Board has essentially held Fairchild
11 strictly liable, in contravention of § 13304 of the Water Code, for the mere use of chemicals of
12 concern at the Site decades ago.¹

13 **I. BACKGROUND**

14 The 0.55 acre Site is located in Palo Alto, California. For ten years, between 1957 and
15 1967, Fairchild occupied the newly constructed building at the Site. After Fairchild's departure,
16 Advalloy, Inc. ("Advalloy"), conducted extensive manufacturing operations in the same location.
17 The Site has been the subject of a Regional Board Site Cleanup Requirements Order since 1990 –
18 first through Site Cleanup Requirements Order No. 90-016 ("1990 Order"), and then through Site
19 Cleanup Requirements Order No. 95-222 ("1995 Order") (Exhibit D, Tabs 1 and 2).² In the
20 Regional Board proceeding resulting in the 1990 Order, the Board rejected naming Fairchild as a
21 discharger and named Advalloy as the sole discharger due to its poor waste handling practices,
22

23
24 ¹ The Petitioner also challenges the Order for failure to accord due process during the proceeding. As detailed in
25 letters dated October 20 and November 3, 2008, numerous procedural irregularities were permitted by the Regional
26 Board in an apparent effort to bolster the record against Fairchild. In addition, Regional Board Staff issued their
27 Staff Report, Response to Comments, and Recommendation less than twenty-four hours after receiving additional
28 comments on December 2, 2008. The December 2 comments do not appear to have been adequately considered by
the Board or its Staff. For example, Staff fail to respond in any manner to the InfraMetrix Letter Report (Exhibit D,
Tab 13).

² The Regional Board has not yet prepared the administrative record. Petitioner will supplement this Petition with
citations to the final record when it has been certified. For purposes of this Petition, citations are to excerpts of the
anticipated Record, in tabbed Exhibit D. After preparation of the record, Petitioner may request the State Board to
supplement the record with such additional evidence as may become available or is relevant to this matter.

1 use and storage of large volumes of acids and solvents, and documented releases of chemicals of
2 concern. Advalloy declared bankruptcy in 1994. East Charleston, Inc. ("ECI"), purchased the
3 Site in 1995, with full knowledge of the soil and groundwater contamination at the Site and the
4 existence of the 1990 Order. In 1995, the Regional Board amended the 1990 Order to name ECI
5 as a discharger. Again, as in 1990, the Regional Board rejected naming Fairchild as a discharger
6 to the 1995 Order.

7 **1. Fairchild's Operations at the Site Were Limited and Ceased More than Forty**
8 **Years Ago**

9 The occupancy and use of the Site was extensively investigated by the Regional Board in
10 connection with its 1990 proceeding leading to the adoption of the 1990 Order. Fairchild was a
11 tenant at the Site between 1957 and 1967. The 14,600 square foot building at the Site had been
12 constructed in 1957, and all of the associated piping, including the sewer laterals, was newly
13 installed. See Transcript of December 10, 2008 Regional Board Hearing ("Tr.") at 15:13-15
14 (Exhibit D, Tab 3). From late 1957 to early 1961 Fairchild used small quantities of solvents and
15 acids in connection with semiconductor research and development activities. See Declaration of
16 Julius Blank (November 21, 1989) ("Blank Declaration") at ¶¶ 9, 10; Declaration of Jeffrey
17 Wilson (November 26, 1969) at ¶ 6 (Exhibit D, Tabs 5 and 6). The small quantities of acids were
18 neutralized in catch-basins before being disposed. See Blank Declaration ¶ 10 (Exhibit D, Tab
19 5). The 1957 lease indicated that the newly installed sewer lateral used by Fairchild was "acid-
20 resistant."³ (Exhibit D, Tab 11). After 1961, Fairchild did not use chemicals of concern at the
21 Site. There is no documented discharge, release, or spill of chemicals during Fairchild's
22 occupancy. In 1967, Fairchild ceased its use of the building and relocated. The company's
23 responsible chemical handling practices and limited chemical usage are documented by
24 declarations of former employees and a variety of historic records. See Blank Declaration and
25

26 ³ At the December 10, 2008 hearing, counsel to the Regional Board, Ms. Won, discounted the relevance of the lease
27 document, telling the Board members that "I do not think you should accept it as Gospel that the lines were acid
28 resistant. This just basically is some kind of lease agreement that says that the sewer lines should be acid resistant
... " Tr. 53:1-5 (Exhibit D, Tab 3). The lease agreement, however, was executed contemporaneously with the
construction of the building in the late 1950s. There is no evidence in the record that indicates the terms of the lease
were inaccurate or that the sewer lateral was not, in fact, acid-resistant.

1 Wilson Declaration (Exhibit D, Tabs 5 and 6).

2 During its occupancy, Fairchild used the building for two purposes. For slightly less than
3 four years, between late 1957 and early 1961, Fairchild conducted semiconductor research and
4 development activities. When research and development was relocated to a new facility in 1961,
5 the building was used by the Fairchild Instrumentation Division until the lease expired in 1967.
6 See Wilson Declaration ¶ 11 (Exhibit D, Tab 6).

7 Declarations by former employees and historic records document that Fairchild's research
8 activities were conducted on an "extremely small scale" at the Site. Blank Declaration ¶ 9
9 (Exhibit D, Tab 5). Chemical usage was confined to a small number of rooms, the use of
10 chemicals in research activities was "very limited," and only a "small quantity of waste acids"
11 were produced. *Id. at* ¶¶ 9, 10 (Exhibit D, Tab 5). Chemicals were used from pint-sized bottles
12 for experiments in petri dishes. *Id.* (Exhibit D, Tab 5). There is no evidence indicating that the
13 amount of chemicals used by Fairchild's researchers changed appreciably during the company's
14 tenancy. Because the Instrumentation Division only assembled and tested mechanical equipment
15 the use of chemicals of concern ceased after the research operations moved in early 1961. The
16 only reported chemical usage by the Instrumentation Division was a small amount of acetone. In
17 their declarations, former employees recalled no chemical spills inside or outside the building
18 during Fairchild's occupancy.

19 The January 17, 1990 Executive Officer Summary Report recommended against naming
20 Fairchild as a discharger, "based on information regarding Fairchild's chemical handling
21 practices and on the fact that there was no documented discharge to the environment during
22 Fairchild's occupancy of the site." (Exhibit D, Tab 7). The 1990 Order concluded that "based on
23 the available history of chemical usage, storage and handling at the site Fairchild is not
24 considered a discharger." Order No. 90—16 at ¶ 7 (Exhibit D, Tab 1). No new historic
25 information about Fairchild's activities at the Site was submitted to the Regional Board during
26 proceedings in 2008. Therefore, the direct evidence characterizing Fairchild's historic usage of
27 the Site is the same today as it was in 1990.

28 ////

1 **2. Advalloy Conducted Extensive Manufacturing Operations at the Site and**
2 **Was Repeatedly Cited for Environmental Violations**

3 Advalloy occupied the Site beginning in early 1968 and purchased the property in 1971.
4 Unlike Fairchild, Advalloy conducted extensive manufacturing operations at the Site for decades
5 until it declared bankruptcy in 1994. These operations required the use of large quantities of
6 solvents and acids in connection with the manufacture of integrated circuit lead frames and
7 resulted in numerous environmental violations. *See* Table 3 – Summary of the Available Records
8 of Advalloy’s Chemical Storage/Usage, Weiss Associates (October 20, 2008) (Exhibit D, Tab
9 15); Table 4 – Advalloy Hazardous Material Handling Violations and Notices (October 20, 2008)
10 (Exhibit D, Tab 16). The Regional Board concluded in 1990 that Advalloy was responsible for
11 the widespread soil and groundwater contamination at the Site. *See* 1990 Order (Exhibit D, Tab
12 1).

13 Advalloy had poor chemical storage, handling, and disposal practices. Regulatory
14 agencies and the Fire Department repeatedly cited Advalloy for violations, including multiple
15 chemical fires, uncontrolled chemical reactions, chemical releases to the sewer, and exceedances
16 of wastewater discharge limits. Advalloy also routinely stored hundreds of gallons of organic
17 solvents and acids on-site. A 1969 Fire Department inspection noted 1,200 gallons of chemicals
18 on Site, including TCE and sulfuric acid. The use and disposal of such large quantities of
19 solvents and acids is known to have severely impacted the building’s infrastructure. For
20 example, by the mid-1980s, Advalloy was forced to replace a sewer line at the rear of the
21 building because it had “rotted-out” due to the company’s discharges. *See* Declaration of James
22 Boarer (November 27, 1989) at ¶ 5.a. (“Boarer Declaration”) (Exhibit D, Tab 8).

23 In 1994, shortly after being named as a discharger on the 1990 Order, Advalloy declared
24 bankruptcy. Although the company apparently continues to exist as a corporate shell, it no
25 longer has any identified assets. The Site was purchased by ECI during the bankruptcy
26 proceedings in April 1995. Principals of ECI met with Regional Board staff prior to the purchase
27 of the Site and, as such, the company was fully aware of the contamination and the 1990 Order
28 requiring remediation. *See* State Water Resources Control Board Order WQ 97-08 at 2

1 (Exhibit D, Tab 14).

2 **3. The Regional Board Declined to Name Fairchild as a Discharger at the Site**
3 **on Two Prior Occasions**

4 In both 1990 and 1995 the Regional Board considered, and rejected, adding Fairchild as a
5 discharger on orders issued in connection with the investigation and cleanup of the Site. The
6 Regional Board thoroughly investigated Fairchild's operations at the Site in the late 1980s and
7 1990. That investigation culminated with issuance of the 1990 Order, which named Advalloy as
8 the sole discharger, and concluded that Advalloy had "contributed chemicals to the groundwater
9 which have migrated offsite." 1990 Order at ¶ 8 (Exhibit D, Tab 1).

10 The 1990 Order was revised in November of 1995, when the Regional Board issued the
11 1995 Order naming ECI as a responsible party. During the proceedings on the 1995 Order, ECI
12 alleged that Fairchild contributed to on-site contamination. The Regional Board staff concluded,
13 however, that ECI failed to present any "new information that would justify reopening [the]
14 issue" of naming Fairchild as a discharger at the Site. *See* Letter from Stephen Morse, Water
15 Board, to Ronald Hothem, East Charleston, Inc., (November 7, 1995) at 2, comment f (Exhibit D,
16 Tab 9). The Regional Board rejected naming Fairchild on the 1995 Order.

17 In 2008, the Regional Board began consideration of a new order for the Site. ECI again
18 seized the opportunity to attempt to get Fairchild named as a discharger. The initial comment
19 period on the Order closed in July 2008. Shortly thereafter, in an August 2008 draft Response to
20 Comments circulated among interested parties, Regional Board staff rejected ECI's suggestion
21 that Fairchild be added to the order to be entered by stating that there was "no new information
22 since 1990 that would cause us to name Fairchild as a discharger." Draft Regional Board
23 Response to Comments (August 5, 2008) at 2 (Exhibit D, Tab 10). Inexplicably, after reopening
24 the comment period and receiving an August 2008 video of the front sewer lateral taken by ECI,
25 Regional Board Staff reversed its position and recommended that Fairchild be named as a
26 discharger. In his comments to the Regional Board at the December 10, 2008 meeting, the
27 Executive Director, Mr. Wolfe, attempted to explain the reversal by stating:

28 ////

1 [O]ur goal really is to ensure that [the] site is adequately cleaned up. We
2 are not necessarily concerned as to who does that ... [B]ased on the
3 additional information we have received over the past few months, [] there
4 is sufficient information to name Fairchild.

5 Tr. 64-65 (Exhibit D, Tab 3). However, as discussed below, the *only* new evidence received by
6 the Regional Board between the draft August 2008 response to comments and the December
7 hearing was a 2008 video of the sewer lateral Fairchild ceased over forty years earlier. Sworn
8 declarations submitted to the Regional Board in 1990 established, without controversy, that
9 Fairchild only disposed of small quantities of chemicals down that sewer lateral between late
10 1957 and early 1961. Despite the lack of any identified release or sampling specifically
11 indentifying the sewer lateral as a source of contamination at the Site, the Regional Board voted
12 4-2 at their December 10, 2008 meeting to adopt the Staff's recommendation and named
13 Fairchild as a discharger. Tr. 67:18-25 (Exhibit D, Tab 3).

14 II. ARGUMENT

15 The Regional Board abused its discretion and acted arbitrarily and capriciously in naming
16 Fairchild as a discharger on the Order because (1) there is no substantial, credible, and reasonable
17 evidence of a discharge, release, or spill during Fairchild's occupancy at the Site decades ago; (2)
18 the Regional Board ignored the conclusions of its own expert, without explanation, that the sewer
19 lateral used by Fairchild had no evidence of corrosion or leaking from chemical discharges; and
20 (3) standard investigatory techniques were not performed to evaluate whether the sewer lateral
21 briefly used by Fairchild is a source of any contamination at the Site. Additionally, the Regional
22 Board has no basis to require Fairchild to remediate up-gradient soil and groundwater
23 contamination for which there is no evidence Fairchild had responsibility. For these reasons, we
24 request that Fairchild be removed from the Order.

25 1. The Regional Board Must Have Substantial, Credible, and Reasonable 26 Evidence to Name a Discharger on a Cleanup and Abatement Order

27 To name a discharger on a cleanup and abatement order, a regional board must satisfy the
28 applicable legal standard by showing that the discharger:

/////

1 ... caused or permitted, causes or permits, or threatens to cause or permit
2 any waste to be discharged or deposited where it is, or probably will be,
3 discharged into waters of the state and creates, or threatens to create a
condition of pollution or nuisance ...

4 Cal. Water Code § 13304(a). The State Board has held that this standard is met where there is
5 “substantial evidence to support a finding of responsibility for each party named” on a cleanup
6 and abatement order. *See In the Matter of the Petitions of Aluminum Co. of America, et al.*,
7 Order No. WQ 93-9 at 7 (citation omitted); State Board Resolution 92-49 ¶ I.A. (determination of
8 a discharger “must be supported by substantial evidence”). Substantial evidence requires
9 “credible and reasonable evidence which indicates that the named party has responsibility.” *See*
10 *In the Matter of the Petition of Exxon Company, U.S.A. et al*, Order No. WQ-85-7 at 12
11 (emphasis added); *see also Western Air Lines, Inc. v. Schutzbank*, 258 Cal.App.2d 218, 250
12 (1968) (Holding that it is “clearly settled that a finding of fact where made by an administrative
13 or a judicial officer, must have ‘credible, competent evidence’ to support it.”).

14 The State Board adopted Resolution 92-49 to standardize the policies and procedures
15 applicable to investigating and naming dischargers pursuant to § 13304 of the Water Code. The
16 Resolution allows a regional board to consider both direct and circumstantial evidence when
17 considering potential dischargers.⁴ However, although a regional board may consider
18 circumstantial evidence, it must accept as true uncontradicted and unimpeached direct evidence
19 provided by an interested party. *See Martori Bros. Distributors v. Agricultural Labor Relations*
20 *Board, et al.*, 29 Cal.3d 721, 728 (1981) (“An administrative board must accept as true the
21 intended meaning of uncontradicted and unimpeached evidence.”) This is particularly relevant in
22 this matter because Fairchild has provided extensive information about its historic use of the Site
23 to the Regional Board. Neither Advalloy, nor ECI, provided any relevant evidence that directly
24 contradicts the historic information provided by Fairchild.

25
26
27
28 ⁴ Although Resolution 92-49 had not been formally adopted by the State Board during the 1990 proceedings on
initial order for the Site, in August 2008 staff represented that “it was standard practice in 1990 (and prior to that
time) for the Regional Water Board to use all available site use history when determining whether or not to name an
entity as a discharger. Therefore, Order 90-016 was consistent with Resolution 92-49.” Draft Regional Board
Response to Comments (August 5, 2008) (Exhibit D, Tab 10).

1 Additionally, in conducting an inquiry to identify potential discharges, regional boards
2 must “[m]ake a reasonable effort to identify the dischargers associated with the discharge.”
3 Resolution 92-49, ¶ I.B. This should be accomplished in a “phased, step-by-step investigation,”
4 *id.* at ¶ 5(b), and include preliminary assessments as reasonably necessary to “confirm the
5 discharge and identify of the dischargers.” *Id.* at ¶ II.A.1.a (emphasis added).

6 Because of the potential costs and liabilities associated with being identified as a
7 discharger, the California legislature has required that regional boards meet a higher evidentiary
8 bar when naming a discharger on a cleanup order as compared to directing a party to investigate
9 potential contamination at a site. As such, § 13267 of the Water Code provides that a regional
10 board may require “any person who has discharged, discharges, or is *suspected* of having
11 discharged ...” to conduct technical investigations to determine the extent and source of
12 contamination. Water Code § 13267(b) (emphasis added). In contrast, a party cannot be named
13 on a cleanup and abatement order unless there is substantial, credible, and reasonable evidence
14 that a party actually “caused or permitted” or “threatens” an identified discharge. Water Code §
15 13304(a).

16 On two prior occasions, after extensive investigation, the Regional Board rejected naming
17 Fairchild as a discharger. Although the Regional Board is not precluded from reversing course, it
18 must have a reasoned and articulated basis for any change from a prior position. *Cf. County of*
19 *Los Angeles v. Leavitt*, 521 F.3d 1073, 1078-79 (An agency is not precluded from changing its
20 mind ... but “an agency changing its course must supply a reasoned analysis indicating that prior
21 policies and standards are being deliberately changed, not casually ignored....”). Failing to
22 provide a reasoned basis for reinterpreting factual information previously considered is an abuse
23 of discretion.

24 **2. The Regional Board Failed to Provide a Substantial, Credible and**
25 **Reasonable Basis to Name Fairchild as a Discharger**

26 In naming Fairchild as a discharger, the Regional Board reversed the position it had taken
27 consistently for the past eighteen years. To justify this extraordinary reversal the Order only
28 provides a brief summary of the Fairchild’s connection to the Site, noting the presence of

1 contamination in the general vicinity of the front sewer lateral. Order at ¶ 3 (Exhibit B). The
2 Order also references the December 3, 2008 Staff Report (“Staff Report”) for support.
3 (Exhibit D, Tab 12). The Staff Report argues that this reversal is justified by “new information”
4 made available since the 1990 and 1995 proceedings. This “new information,” however, consists
5 of only:

- 6 1. An August 29, 2008 video of the underground sanitary sewer lines at
7 four locations at the Site; and
- 8 2. Recent Water Board case experience where discharge of chlorinated
9 solvents to the sanitary sewer line was the source of a discharge to soil
and groundwater.

10 Staff Report at 2 (Exhibit D, Tab 12). Similarly, staff explained at the December 10, 2008
11 hearing that “[t]he reason we changed our recommendation from 1990 is that we now have two
12 new pieces of evidence that were not available in 1990 – the sewer video showing corrosion, and
13 the increased experience that sewer lines are prone to leak chlorinated solvent.” Tr. at 10:18-22
14 (Exhibit D, Tab 3).

15 With the exception of these two “new pieces of evidence,” all other available evidence
16 about Fairchild was evaluated by the Regional Board staff in 1990, 1995, and again in early
17 August 2008. In each of those three instances the staff concluded there was insufficient evidence
18 to justify adding the company as a discharger. The alleged “new evidence” is also insufficient to
19 name Fairchild as a discharger, whether considered independently, or in conjunction with the
20 preexisting information about the Site. As addressed below, the “new” evidence does not support
21 the conclusion that the sewer lateral was ever a source of contamination, much less that it leaked
22 during the 1957 to 1961 timeframe when Fairchild was using small quantities of solvents and
23 acids at the Site.

24 A. August 2008 Sewer Video Cannot Provide Substantial, Reasonable,
25 Credible Evidence of a Discharge in 1961 or Earlier

26 In submitting the video of the northern sewer lateral, ECI claimed it showed evidence of
27 damage caused by Fairchild’s operations between 1957 and 1961. The methodology used to
28 video the lateral failed to meet the Pipeline Assessment and Certification Program standards

1 developed by the National Association of Sewer Services Companies. *See* Letter Report from
2 InfraMetrix (December 1, 2008) (Exhibit D, Tab 13). More significantly, however, is that the
3 sewer lateral has been in continuous use for more than fifty years. A video of the sewer line in
4 2008 has no relevance to Fairchild's use of the new pipe four decades earlier.⁵ The video of a
5 sewer lateral, therefore, cannot provide substantial, credible, reliable evidence of a discharge in
6 1961 or earlier.

7 The sewer lateral was installed at the time the building was constructed in 1957 and, as
8 noted above, was specified as "acid-resistant" in the lease. The lateral has been in continuous use
9 for more than fifty years. Fairchild disposed of small quantities of solvents and neutralized acids
10 through the sewer lateral between 1957 and 1961. After 1961, the sewer line was used by
11 Fairchild for sanitary waste. Advalloy continued using the lateral when it began operations at the
12 Site in 1967.⁶ Boarer Declaration ¶ 10 (Exhibit D, Tab 8). The sewer lateral remains in service
13 today.

14 The Staff Report admitted that it "is not possible to tell exactly when the corrosion
15 occurred based on a video of a 50-year old pipe." Staff Report at 8 (Exhibit D, Tab 12). The
16 Staff also agreed that the sewer lateral was new when Fairchild first occupied the building at the
17 Site, Tr. 15:13-15 (Exhibit D, Tab 3), and that a "newer sanitary sewer line should be less
18 susceptible to leakage." Staff Report at 8 (Exhibit D, Tab 12). In fact, the Executive Officer
19 expressly recognized that the corrosion observed in the sewer video "could have potentially
20 occurred just on basic day to day use." Tr. 50:16-18 (Exhibit D, Tab 3). The entirety of the
21 Regional Board Staff's analysis of whether the video supports naming Fairchild as a discharger
22

23 ⁵ Additionally, any alleged damage would have been apparent in 1990 and 1995. Fairchild is prejudiced by failure
24 of the Regional Board to order an earlier investigation of the sewer lateral and ECI's delay in submitting a video
since the lateral has continued to deteriorate over the previous 18 years since the 1990 Order.

25 ⁶ There are two separate sewer laterals at the Site. *See* Site Map (Exhibit D, Tab 4). The sewer lateral at issue in this
26 Order is the northern lateral leading from the building to the sewer main along East Charleston Road. The second
27 lateral is on the southern side of the building leading to the sewer main along Fabian Way. During the 1990
28 proceeding the Regional Board concluded that the southern lateral and associated sump had not yet been constructed
during Fairchild's occupancy. There are no records, however, documenting when Advalloy constructed the southern
sewer lateral and associated sump. Therefore, it is probable that Advalloy discharged both sanitary and process
chemicals to the northern sewer lateral when it initially began manufacturing at the Site in the 1960s. Additionally,
there is an acid bath drain identified in Advalloy drawings with no identified outlet; this bath may have discharged to
the northern sewer line.

1 consisted of the conclusion that “[r]egardless of the origin of the *apparent* defects at 57 and 58
2 feet, the defects *could* be a source of leakage from the pipe.” Staff Report at 5 (emphasis added)
3 (Exhibit D, Tab 12). However, as evidenced by this statement, Staff characterized the alleged
4 leakage points as only “apparent” defects, described the potential for leakage as only a
5 possibility, and came to no credible or reliable conclusion about the cause or timing of the
6 alleged defects. This is an insufficient basis upon which to name a discharger on a cleanup order.

7 Indeed, the Regional Board’s own expert on sewer line corrosion did not support the
8 conclusion that the sewer video was evidence of a Fairchild discharge. The Regional Board
9 retained an independent expert, Mr. Richard Cunningham, the Public Works Director for the City
10 of Albany, to review the sewer video. Mr. Cunningham reported that:

11 the corrosion [in the video] appears to be *classic wear patterns of normal*
12 *corrosion for a fifty-year-old cast iron sanitary sewer pipe*. The small
13 indentation-marks in the sides of the pipe along its total length appear to be
14 the cast iron pipe slowly delaminating. There do not appear to be signs of
15 significant acid-based corrosion along the length of the pipe which would
16 be indicated with distinct troughing or tunneling along the length of the
17 pipe. There appears to be bare soil at the 57-foot marker and a trough at
the 58-foot marker, but these are unusual in that they are an isolated
occurrence and not consistent throughout the length of the pipe. One
possible cause for these occurrences could be an external disturbance to
the pipe at this location. ...

18 Staff Report at 4-5 (emphasis added) (Exhibit D, Tab 12). The Regional Board’s own expert,
19 therefore, concluded that the 2008 sewer video showed no evidence of corrosion indicating that
20 Fairchild disposed of acids or other chemicals that resulted in a leak more than four decades ago.
21 Similarly, the alleged bare soil at the 57-foot marker was reported to be “isolated” and likely due
22 to an external disturbance. To the extent there is any leak in the pipe, the Regional Board’s
23 expert concluded there was no evidence showing that Fairchild’s limited chemical usage
24 compromised the integrity of the new case iron sewer line or caused a discharge. Similarly, the
25 expert did not provide any information on when an external disturbance may have damaged the
26 pipe. See Staff Report at 4-5 (Exhibit D, Tab 12). If the Regional Board seeks to reject the
27 conclusion of its own independent expert, it must be done explicitly and through reasoned
28 analysis supported by the evidence. This was not done.

1 Mr. Cunningham's conclusions were presented in a misleading manner at the December
2 10, 2008 hearing. Staff reported that their independent expert "agreed with us that there was
3 corrosion in the pipe" in connection with a discussion concerning Fairchild's responsibility for
4 leakage from the sewer lateral. Tr. 16:15-17 (Exhibit D, Tab 3). However, as is evident in the
5 Staff Report, Mr. Cunningham's conclusion about corrosion in the pipe was that it was consistent
6 with "classic wear patterns of a normal ... fifty-year-old cast iron sanitary sewer pipe." Staff
7 Report at 4-5 (Exhibit D, Tab 12). This statement erroneously prejudiced Fairchild and any
8 reliance on it by board members would be an abuse of discretion.

9 B. Distribution of Contamination at the Front of the Building is Inconclusive
10 and Cannot Support a Determination that the Sewer Lateral is a Source

11 If the sewer lateral was a source of contamination at the front of the Site, higher
12 concentrations of chlorinated solvents would be expected in the higher water bearing zone ("A
13 Zone"), in the vicinity of the sewer line. Near the sewer lateral, however, concentrations of
14 chlorinated solvents are about an order of magnitude higher in the deeper B Zone than the A
15 Zone. Additionally, the highest concentrations of chlorinated solvents at the front of the building
16 have been found in a well located adjacent to the building on the north-west corner of the Site.
17 See TCE Isoconcentration Contours in A Water-Bearing Zone on October 19, 1999, Weiss
18 Associates (October 20, 2008) (Exhibit D, Tab 18). That A-zone well is located more than forty
19 feet cross- and up-gradient of the sewer lateral. As such, the pattern of contamination at the Site
20 is not consistent with a release from the sewer line.

21 The Regional Board, in jumping to the conclusion that the northern sewer lateral is a
22 source of contamination, failed to make a reasonable effort to investigate the Site or identify the
23 source of discharges. State Board Resolution 92-49 recognizes the importance of an initial
24 assessment of a potential discharge sources, which may include soil gas surveys, shallow
25 geophysical surveys, and the sampling and analysis of soil and soil pore moisture. See
26 Resolution 92-49 ¶ III.D. With certain exceptions that are not relevant, Resolution 92-49
27 requires that regional boards take a "phased, step-by-step" approach to the investigation and
28 cleanup of a contaminated site. In its report, the Staff recognizes that "current investigative

1 practices [for sewer lines] usually include collecting soil, soil gas, and groundwater samples
2 around and beneath sanitary sewer lines.” Staff Report at 5 (Exhibit D, Tab 12). However, in
3 determining the sewer lateral is a source of contamination, the Regional Board neither took a
4 phased step-by-step approach nor used reasonable efforts to investigate the Site. Straightforward,
5 industry-standard investigatory procedures, routinely used at other sites, would provide
6 significant information about whether the sewer lateral was ever a source of contamination at the
7 Site. These tests have not been done. Without performing such tests, there is no basis to
8 conclude that it is more likely than not that the sewer lateral is a source of contamination.⁷

9 The Regional Board failed to reasonably consider the numerous other sources for the
10 observed contamination at the front of the building, including: (1) the potential for cross-
11 contamination from the rear of the building as detailed in a site-conceptual model presented to
12 the Regional Board by Fairchild consultants, Weiss Associates; (2) potential unidentified sources
13 originating from inside the building; (3) potential spills or other industrial accidents associated
14 with Advalloy’s two and a half decade use of the Site for heavy manufacturing; (4) recent spills
15 or midnight dumping that may have occurred at the front of the Site following Advalloy’s
16 bankruptcy; and/or (5) changes in the distribution of contamination due to the pumping,
17 treatment, and reinjection of groundwater at the Site.⁸ Any of these possibilities provides an
18 entirely reasonable alternative explanation for the observed contamination at the front of the Site.
19 In fact, an unidentified spill or source from inside the building is a better explanation for the
20 distribution of contamination because the limited groundwater data available from the front of the
21 building shows the highest contamination levels up-gradient of the alleged leak in the sewer
22 lateral.

23 The Regional Board certainly has authority to require further reasonable investigation of
24

25 ⁷ If soil gas sampling and shallow soil samples indicated that the sewer lateral was a likely source, it remains
26 possible that any contamination may have been released after Fairchild’s departure. Regardless, without such tests it
is unreasonable to conclude the sewer line is the source of contamination observed at the front of the Site.

27 ⁸ In the period between 1999 and 2002, four extraction wells removed nearly 14 million gallons of groundwater,
28 which was reinjected at the southern end of the site following treatment. The reinjection apparently resulted in
“increase of TCE concentrations in the groundwater.” Order at ¶ 8 (Exhibit B). The treatment likely also altered the
distribution of groundwater contamination at the Site. See Tr. 7:21-23 (noting that 1999 monitoring data was used
because it was before initiation of the treatment system) (Exhibit D, Tab 3).

1 the sewer lateral pursuant to Water Code § 13267 to evaluate whether it is a source of
2 contamination at the Site. Examples of tests that would have provided significantly more
3 information about the sewer line would include soil gas monitoring and shallow geophysical
4 surveys and soil samples. All of these are identified in Resolution 92-49 and routinely used to
5 investigate sewer lines at other sites. Absent additional data on any source of contamination at
6 the front of the Site, the Regional Board, however, does not have the authority to name Fairchild
7 as a discharger pursuant to Water Code § 13304. Doing so relies entirely on unsupported
8 conjecture that the sewer lateral “might have been” a source, but does nothing to investigate or
9 exclude other equally, or more likely sources that would not be attributable to Fairchild.

10 C. Circumstantial Evidence from Experience at Other Sites is Not Substantial,
11 Reasonable, Credible Evidence Adequate to Add Fairchild to the Order

12 Since the August 2008 sewer video cannot support naming Fairchild as a discharger, the
13 only remaining piece of “new” information to support the Regional Board’s decision is the staff’s
14 “recent” experience that a discharge of chlorinated solvents to a sanitary sewer line can be a
15 source of discharge to soil and groundwater. Staff Report at 2 (Exhibit D, Tab 12). The
16 Regional Board, however, has never named a discharger based upon evidence of discharge to a
17 sewer line alone, without substantial corroborating evidence that the sewer line is a source of
18 contamination to the soil and/or groundwater.

19 The Staff Report recognizes that “it is possible that the TCE found in soil and
20 groundwater [to the north of the building] could be caused by Advalloy,” but argues, in apparent
21 reliance on staff experience at the other sites, that “it is more likely that the TCE ... would be
22 from a discharge from the northern side of the building, which is where Fairchild discharged to
23 the sanitary sewer.” Staff Report at 9 (Exhibit D, Tab 12). In the presentation to the Board, staff
24 claimed that “experience at other cleanup sites is that sewer lines that receive chlorinated solvents
25 are often a release point for dischargers to soil and groundwater.” Tr. 7:14-16 (Exhibit D, Tab 3).
26 Yet, staff admitted that it was “not possible to pinpoint the exact time when corrosion [in the
27 relevant sewer lateral] took place” and a discharge would have occurred at the Site. *Id.* This is a
28 *critical* element, because Fairchild ceased the discharge of small quantities of solvents to the

1 sewer line in 1961. In an effort to bolster its argument, staff “conducted an internal survey of
2 active cleanup sites ... to identify cases where leaks from sanitary sewer lines were the source of
3 discharges to soil and groundwater.” Staff Report at 5 (Exhibit D, Tab 12). The results of this
4 survey, which only identified eleven sites, were included in Table 1 of the Staff Report.⁹
5 (Exhibit D, Tab 12).

6 None of the eleven sites, however, are analogous to the circumstances at this Site or
7 Fairchild’s potential liability. Seven of the eleven sites have no cleanup and abatement orders.
8 (Table, Exhibit C). With few exceptions, those seven sites are current or former dry cleaning
9 operations that used, and released solvents for decades. Cleanup at these sites is either being
10 undertaken voluntarily by a current property owner or investigations are proceeding under the
11 Regional Board’s authority pursuant to Water Code § 13267. The Regional Board’s authority
12 pursuant to § 13267, however, is substantially broader than its authority to name responsible
13 parties on cleanup and abatement orders. Therefore these sites cannot provide justification for
14 naming Fairchild on a cleanup order or the conclusion that a new sewer lateral would be expected
15 to leak after less than four years of usage.

16 The remaining four sites used as examples by Regional Board staff are large former
17 industrial facilities where the named dischargers operated for long periods of time and there is no
18 evidence that an earlier industrial occupant is responsible for any discharges or, in most cases,
19 exists. None of the four orders issued for these sites specify a discharge from a sewer line as a
20 basis for naming a discharger. Technical reports for some of the sites call into question whether
21 contamination resulting from leaks in sewer lines have even been identified. For example, a
22 recent investigation report for one site noted a break in a sewer line due to tree root penetration,
23 not chemical corrosion, and concluded that “the relationship between this sewer line break and
24 the observed TCE impacts [are] unknown.” Supplemental Remedial Investigation Report,
25 Plymouth Street Site (May 15, 2008) at 4-8 (Exhibit C, Tab 1). The circumstances at these sites
26 are not even remotely analogous to Fairchild’s history at the Site, where only small quantities of

27 _____
28 ⁹ Additional information from the Regional Board’s own files on these eleven sites, including information on the
sources of contamination and responsible parties, is summarized in a table at Appendix C.

1 solvents were used for a brief period, decades ago, followed by Advalloy's significantly larger
2 and messier operation.

3 Rather than providing "reliable and credible" evidence that Fairchild should be named as
4 a discharger, the information cited by the Regional Board staff is merely anecdotal. Of the more
5 than 1,000 site cleanups overseen by the Regional Board, it has only identified eleven sites where
6 sewer lines may have leaked. See [http://www.swrcb.ca.gov/sanfranciscobay/water_issues/](http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/sitecleanupproject.shtml)
7 [programs/sitecleanupproject.shtml](http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/sitecleanupproject.shtml) ("The Water Board oversees site cleanup at over 1,000 sites
8 in our region"). There is no scientific analysis or quantification of the likelihood that a new cast
9 iron pipe would be more likely than not to leak after only four years of use similar to what
10 occurred at this particular Site. The Regional Board staff has glossed over a number of highly
11 relevant technical issues in making a blanket statement that the sites it has referenced are relevant
12 to the circumstances at this Site. For instance, the Regional Board staff failed to distinguish
13 whether pipes at other sites it claims support its conclusion that the new cast iron sewer lateral
14 would have leaked were, in fact, cast iron or were instead vitrified clay pipe. This is a critical
15 distinction because, as the Regional Board itself recognized, "cast iron pipe is ... less susceptible
16 to leakage ... [as compared] to [vitrified] clay pipe." Tr. 15:2-3 (Exhibit D, Tab 3). At this Site,
17 there is no evidence that the vitrified clay pipe, to which the cast iron pipe is connected, is
18 corroded. See Fact Finding Memo prepared by Regional Board Staff (October 27, 2008) at 1
19 (Exhibit D, Tab 17). A number of the sites referenced by the Regional Board, however, involved
20 alleged leaks from vitrified clay pipe. For instance, the alleged leaking sewer line at the Roy's
21 Dry Cleaner Site was vitrified clay pipe, not cast iron. See Excerpts from Kennedy/Jenks
22 Consultants Letter Report (February 20, 1998) at 1 (Exhibit C, Tab 2). In fact, the sewer lateral
23 from the dry cleaner to the vitrified clay pipe main, which was almost certainly cast iron, was
24 reported to be in "very good condition" by Regional Board Staff. Staff Summary Report for
25 City of Redwood City, Sequoia Station (September 16, 1998) at 1 (Exhibit C, Tab 3). As such,
26 the Roy's Dry Cleaner Site supports a conclusion that cast iron is unlikely, as compared to
27 vitrified clay pipe, to leak. Similarly, the leaking sewer main at the Sunnyvale Site was
28 determined to be an "antiquated vitreous clay pipe." A number of other significant technical

1 issues, such as the comparative age of the allegedly leaking sewer lines at these other sites, and
2 the types and quantities of discharges, are left unexplored by the Regional Board's overly broad
3 generalization that sewer lines are "known to leak."

4 Investigation of these other sites also demonstrates the comparatively limited amount of
5 information available about the sewer lateral at this Site and the notable departure from the
6 Regional Board's policies and practice in naming Fairchild on a cleanup order prior to adequately
7 characterizing the source of contamination. For example, investigations at the Roy's Dry
8 Cleaning Site identified a plume of solvent contamination in the vicinity of the sewer main and
9 Regional Board staff apparently concluded that a sewer video identified leaks in that main.
10 Rather than issue a Cleanup and Abatement Order, the Regional Board required further site
11 characterization by owners pursuant to Water Code § 13267, including soil borings. Despite the
12 plume location and sewer video, these soil borings, according to Regional Board Staff, were
13 "necessary" to "determine whether the sanitary sewer ... is the source of volatile organic
14 compounds found in the groundwater." Letter from Stephen Morse, Chief, Toxics Cleanup
15 Division, Regional Board to R.B. Dantes, District Branch Chief, Caltrans (November 8, 1999) at
16 1 (Exhibit C, Tab 4). Rather than being an anomaly, the investigation of whether sewer lines
17 were potential sources of contamination at the sites referenced by the Regional Board *routinely*
18 involved soil borings, soil gas monitoring, and other similar techniques. None of that has been
19 done at this Site.

20 Certainly, the mere discharge to a sewer line has never been the sole basis for naming a
21 party on a cleanup order. The representation, therefore, that "recent experience" provides
22 substantial circumstantial evidence adequate to support naming Fairchild as a discharger is
23 erroneous and cannot be considered "reliable or credible."

24 At the December 10, 2008 hearing, there was also an allegation, based on highly
25 circumstantial and thinly supported evidence, that the couplings in the sewer lateral might have
26 failed due to Fairchild's brief use of the new sewer lateral. There is not any evidence in the
27 record to support a conclusion that the couplings are a source of contamination and the Staff
28 Report provides no meaningful analysis of this issue. This is not surprising because there has

1 been no investigation of the couplings and, with one exception, there is nothing in the record
2 about the composition, location, or integrity of the couplings. The single exception is testimony
3 from ECI's consultant that the joint between the cast iron lateral sewer line and vitrified clay pipe
4 is in "pretty good condition." Tr. 35:20-24 (Exhibit D, Tab 3). That testimony undermines any
5 argument that the joints were degraded by Fairchild's use of the sewer line. Without further
6 investigation of the location, type, and condition of the couplings, this allegation cannot support
7 the naming of Fairchild as a discharger.

8 In voting to name Fairchild on the Order, statements made by board members at the
9 December 10, 2008 hearing demonstrate reliance upon the staff's thinly supported circumstantial
10 argument. For example, Board Member Singh stated:

11 [s]o on the comment from our attorney, that even if there is a *chance*
12 [Fairchild] contributed in a very small or insignificant amount, but they do
13 contribute to this problem, and the discharge is chemical, and there is a
14 *chance* there was a leak from the sewer system apparently, and corrosion,
then we should hold them responsible. So on that basis of the argument, I
am going to vote for the resolution ...

15 Tr. 67:1-8 (emphasis added) (Exhibit D, Tab 3). The relevant standard, however, demands more
16 than a "chance" that a former operator caused or permitted waste to be discharged. Rather, the
17 Regional Board must conclude that it is more likely than not, based upon substantial, credible,
18 and reliable evidence, that such a discharge occurred. The "recent" experience cited by Staff
19 does not provide such evidence.

20 3. **The Order Improperly Requires Fairchild to Remediate Soil and**
21 **Groundwater Contamination Upgradient from Any Alleged Fairchild**
22 **Discharge**

23 The Order requires Fairchild to implement the remedial action plan, which calls for
24 treatment of the groundwater throughout the Site to the cleanup standards identified in ¶ 2 of the
25 Order. Additionally, the Order requires that soil cleanup standards for soil be met throughout the
26 unsaturated zone at the Site, Order ¶ 3, and requires the removal of all contaminated soil at the
27 Site including from "former industrial work areas where soil cleanup standards ... are exceeded
28 such as the former compressor and cladding areas." It is incontrovertible that a party must be the
proximate cause of a harm to be held liable for any resulting damages. *See, e.g., Edwards v. A.L.*

1 *Lease & Co.*, 46 Cal.App.4th 1029, 1035 (6th Dist. 1996) ("As a general rule, tort liability is
2 dependent upon the plaintiff's ability to demonstrate that his or her damages were caused by the
3 defendant, and this rule applies in strict liability as well as negligence cases"). The Regional
4 Board cannot require Fairchild to remediate contaminated soil and groundwater upgradient from
5 any claimed Fairchild source.

6 Assuming, *arguendo*, that the sewer lateral is a source of contamination at the Site, it
7 would have only resulted in groundwater contamination on the northern portion of the property.
8 It is, therefore, an abuse of discretion to require Fairchild to remediate groundwater
9 contamination caused by Advalloy's leaking sump and piping at the rear of the property. The
10 Regional Board concluded in 1990 that Advalloy was responsible for groundwater contamination
11 at the rear of the property. Nothing in the record for the current Order alters that conclusion.

12 Similarly, the Order requires soil cleanup in the unsaturated zone of former industrial
13 work areas associated with Advalloy's manufacturing operations. There is not, however, any
14 evidence in the record that Fairchild caused or contributed to contamination in these areas.¹⁰
15 Even assuming that the sewer lateral is a source of contamination, it would not have contributed
16 to the contamination of up-gradient, unsaturated soil located dozens, or perhaps hundreds, of feet
17 away. There is, therefore, no basis to require Fairchild to remediate these soils.

18 **III. REQUEST FOR STAY**

19 To avoid a manifest injustice, Petitioner requests that the State Board stay implementation
20 of the Order as it applies to Fairchild until it issues a decision on this Order. Water Code § 13321
21 provides the State Board with authority to stay the Order. The State Board will hold a hearing to
22 evaluate a request for a stay where a petitioner alleges and provides proof of the following three
23 criteria:

- 24 1. There will be substantial harm to the petitioner or to the public interest
if a stay is not granted;
- 25 2. There will be no substantial harm to other interested persons and to the
26 public interest if a stay is granted; and

27 ¹⁰ For instance, Avalloy's former "cladding" area is at the rear south-east corner of the building. This location is on
28 the opposite side of the building, and upgradient from the northern sewer lateral. It is also upgradient from the areas
where Fairchild used wet chemicals within the building.

1 3. There are substantial questions of fact or law regarding the disputed
2 action.

3 23 CCR § 2053. These three elements are met in this matter.

4 Schlumberger Technology Corporation ("STC"), as the successor in interest to certain
5 Fairchild environmental liabilities, will be required to expend significant funds to comply with
6 the requirements of the Order in the short term. The Order requires extensive site
7 characterization and soil removal, as well as ongoing sampling and monitoring, over the next six
8 months. This includes a requirement for the removal of soil in unsaturated locations upgradient
9 from the alleged discharge that is the basis cited for naming Fairchild on the Order. The
10 Regional Board made no allegation in its December 3, 2008 Staff Report or at the December 10,
11 2008 hearing that Fairchild is responsible for unsaturated soil contamination in the number of
12 areas that will require removal pursuant to the Order.

13 The two other named dischargers do not appear to have the financial means to reimburse
14 STC for costs it will incur to comply with the Order. Advalloy is bankrupt. ECI is a privately
15 held company. Although its financial information is not publicly available, evidence indicates
16 that ECI may have insufficient funds for the cleanup. For example, ECI had not agreed to fund
17 or split costs required to prepare a supplemental remedial investigation work plan due no later
18 than January 30, 2009. ECI has a history of neglecting the requirements imposed for prior orders
19 and refusing to disclose financial records. For instance, the Regional Board adopted two orders
20 assessing administrative penalties against ECI for its failure to comply with the requirements of
21 Order 95-222 and failure to provide requested financial information. In the course of contesting
22 the penalties, ECI claimed that "it did not have enough money to begin the cleanup activity."
23 State Water Resources Control Board Order WQ 97-08 at 2 (Exhibit D, Tab 14). Although ECI
24 has performed some minimal remedial work at the Site, there is a substantial risk that STC will
25 be unable to recover the substantial costs of complying with the Order prior to the State Board's
26 final decision on this Petition.

27 There will be no substantial harm to the public or other interest parties if a stay is granted.
28 The Site is currently owned by ECI and used for warehouse purposes. Since zoning prevents any

1 residential use of the property, there will be no significant change in the type of use of the
2 property in the short term. Additionally, the Regional Board has been aware of the
3 contamination for at least 18 years and a delay of several months will not substantially alter or
4 delay the long term remediation of the Site.

5 Finally, as discussed above, there is a substantial question of fact and law concerning the
6 Regional Board's failure to cite substantial, credible, and reliable evidence in support of naming
7 Fairchild as a discharger on the Order. The Regional Board has never named a discharger under
8 similar circumstances. The sewer lateral has not conclusively been determined to be a source of
9 chemicals of concern and there is no direct evidence of any other release to the environment by
10 Fairchild during its limited occupancy and operation. The Regional Board also failed to follow
11 standard policies and procedures for investigating sewer lines by neglecting to investigate soil
12 gas, shallow soil, and shallow groundwater along the sewer lateral before naming Fairchild on the
13 Order.

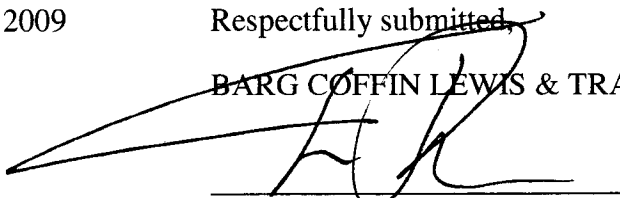
14 **IV. CONCLUSION**

15 For the foregoing reasons, the Petitioner respectfully requests that the State Board stay
16 operation of the Order until the petition for review has been fully considered, allow the record to
17 be supplemented to include relevant information as necessary for the State Board's full and fair
18 evaluation of this matter, and remove Fairchild as a named discharger on the Order.

19 DATED: January 9, 2009

Respectfully submitted,

20 BARG COFFIN LEWIS & TRAPP, LLP

21 
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LLP

EXHIBIT B

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION

ORDER NO. R2-2008-0104

ADOPTION OF FINAL SITE CLEANUP REQUIREMENTS and RESCISSION OF ORDER NO. 95-222 FOR:

ADVALLOY, INC.
EAST CHARLESTON, INC., AND
FAIRCHILD SEMICONDUCTOR CORPORATION

for the property located at

844 EAST CHARLESTON ROAD
PALO ALTO
SANTA CLARA COUNTY

The California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter Water Board), finds that:

1. **Site Location:** The Site is located at 844 East Charleston Road in Palo Alto (Figure 1). The Site is 0.55 acres and is bounded by East Charleston Road to the north, Fabian Way to the south and existing structures to the east and west. The current two-story Building at the Site occupies approximately 14,600 square feet. Areas surrounding the Building are paved. Land use in the surrounding area is commercial, light industrial and proposed residential.
2. **Site History:** The Building at the Site was constructed in 1957 and was occupied by Fairchild Semiconductor Corporation (Fairchild) until 1967. From 1957 through 1961, Fairchild conducted research and small-scale production of integrated circuits at the Site; from 1961 through 1962, it conducted research and development; and from 1962 through 1967, it conducted instrumentation manufacturing. Fairchild used chlorinated solvents such as trichloroethylene (TCE) and acids in its industrial processes and discharged these chemicals to the Building's northern sanitary sewer.

Advalloy, Inc. (Advalloy) leased the Site in 1968 and purchased the property in 1971. Advalloy occupied the Site until 1989. Advalloy's industrial activities at the Site involved precision metal stamping for the semi-conductor industry. These activities required the use of chemicals such as degreasers, paint thinners, acids, and detergents. The activities generated a variety of hazardous wastes. Solvents were introduced to the subsurface soils through disposal into the sanitary sewer lines, and possibly a former water drain, that discharged into a sump in the rear of the Building. The sump then discharged into the sanitary sewer along the centerline of Fabian Way to the south of the Site. The depth of the sanitary sewer and sump varies from about three to five feet below the ground surface. Additional information on Site history is contained in the December

3, 2008, staff report, which the Board hereby incorporates by this reference.

Advalloy declared bankruptcy in 1994. East Charleston, Inc., (East Charleston) acquired the property in bankruptcy in 1994.

3. **Named Dischargers:** Fairchild is named as a discharger because of substantial evidence that it discharged pollutants to soil and groundwater at the Site, including its use of chlorinated solvents and acids in research and small-scale production of integrated circuits and instrumentation, its discharge of waste solvents and acids to the northern sewer line, and the presence of these chlorinated solvents in groundwater in the immediate vicinity and downgradient of the northern sewer line. The rationale for naming Fairchild is contained in the December 3, 2008, staff report, which the Board hereby incorporates by this reference.

Advalloy is named as a discharger because of substantial evidence that it discharged pollutants to soil and groundwater at the Site and because it owned the property during or after the time of the activity that resulted in the discharge, had knowledge of the discharge or the activities that caused the discharge, and had the legal ability to prevent the discharge.

East Charleston is named as a discharger because it owned the property during or after the time of the activity that resulted in the discharge, has knowledge of the discharge or the activities that caused the discharge, and has the legal ability to control the discharge.

If additional information is submitted indicating that other parties caused or permitted any waste to be discharged on the Site where it entered or could have entered waters of the State, the Water Board will consider adding that party's name to this Order.

4. **Regulatory Status:** This Site has been subject to the following Orders:
- Site Cleanup Requirements (Order No. 95-222) adopted on November 15, 1995.
 - Site Cleanup Requirements (Order No. 90-016) adopted on January 17, 1990, and rescinded on November 15, 1995, by Order No. 95-222.
5. **Site Hydrogeology:** The Site is located on a series of overlapping distal alluvial fans deposited by east-flowing streams descending from the Santa Cruz Mountains. The distal fan/basin environment of deposition generally contains fine-grained, clay-rich sediments except for former channel deposits that contain coarser deposits. The regional topography slopes north-northeast toward San Francisco Bay. The regional groundwater direction is northeast towards San Francisco Bay. The groundwater gradient varies between 0.0025 and 0.005. A water bearing zone (A-aquifer) is found between 6 to 30 feet bgs (below ground surface). A deeper water bearing zone (B-aquifer) is found between 38 to 55 bgs. The C-aquifer has been encountered between 80 and 90 feet bgs. The shallow groundwater (found approximately between 6 and 55 feet bgs) generally occurs and migrates through a complex network of buried stream channels in a northerly direction.

6. **Remedial Investigation:** VOCs have been detected in soil and shallow groundwater at the Site and in shallow groundwater downgradient of the Site. The primary VOCs detected are trichloroethylene (TCE) and its associated degradation products cis-1,2 dichloroethylene (DCE) and vinyl chloride (VC). In September 2008, TCE, DCE and VC were detected in the onsite A-aquifer at the respective groundwater concentrations of 440 µg/L (ppb), 96 ppb and 1,400 ppb. In October 2008, TCE, DCE and VC were detected in the onsite B-aquifer at the respective groundwater concentrations of 42,000 ppb, 4,300 ppb and 45,000 ppb. The bulk of the contamination is found in the B-aquifer downgradient of the Building. TCE groundwater detections as high as 110,000 ppb were recorded in February 2008 in the B-aquifer north across East Charleston Road directly downgradient of the Site. TCE detections were recorded off-site at concentrations exceeding 1,000 ppb at least 400 feet downgradient and at lower concentrations at least 1,000 feet downgradient of the Site.

Seventeen monitoring, extraction, and injection wells have been installed at the Site (Figure 1). Two monitoring wells clusters (MW-01 and MW-02) have been installed on the 901 San Antonio Road property downgradient of the Site by the owners. Monitoring well clusters (F25-1 through F25-4, PB1-2 and PB2-1) installed at 3963/3977 Fabian Way have reported TCE and related TCE breakdown products. One A-aquifer well (MW-8) was installed on the 860 East Charleston Road property. Two A-aquifer monitoring wells (MW-4 and MW-5) have been installed upgradient of the Site. The full extent of the groundwater VOC contamination downgradient and cross gradient of the Site in the A- and B- aquifers has not been fully determined. Further investigation is needed to complete the definition of the extent of groundwater pollution at the Site and downgradient of the Site. To the maximum extent possible, proposed remedial actions shall be designed to avoid interference with land uses and operations at downgradient properties.

Petroleum hydrocarbons have been detected in soil at concentrations up to 21,000 ppm at shallow depths (0.5 - 1.0 feet bgs). Lead, chromium and copper have been detected in soils at respective concentrations up to 2,400 ppm, 150 ppm and 97 ppm. The source of the petroleum hydrocarbons and lead is considered to be blow-down from a compressor, and possibly its hydraulic or cooling fluid. Further investigation is needed to accurately determine the extent of contamination in soils in various work areas at the Site.

The vapor intrusion pathway to indoor air has not been evaluated at the Site or at properties downgradient of the Site that are not the subject of a Risk Management Plan approved by the Water Board. Soil gas sampling is needed to evaluate this pathway.

7. **Adjacent Sites:** Several other sources of VOC pollution exist in the vicinity of the Site (see Figure 1). These sites include:

North of the Site

Space Systems/Loral, Inc., occupies two buildings (Buildings 7 and 8) and is located at 3963-3977 Fabian Way. This property is owned by Far Western Land & Investment, Inc., which leased the property from 1959 to 1990 to the former Ford Aerospace Corporation